IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 21309 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? Yes

2 To be referred to the Reporter or not ? Yes

3 Whether their Lordships wish to see the fair copy of the judgment ? No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? No

5 Whether it is to be circulated to the civil judge ? No

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PRAMOD BHAGWAN NAYAK - Petitioner(s)

Versus

STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :

MR. AMRISH PANDYA for MS. KRISHNA U MISHRA for Petitioner(s) : 1,
Mr. L.R. PUJARI, AGP, for Respondents

Ms. Banna Datta, advocate, appears as Amicus Curiae

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 21/02/2006

ORAL JUDGMENT

Pramod Bhagwan Nayak, petitioner, original detenu, has filed this habeas corpus petition challenging

the order dated 23.8.2005 passed by the Police Commissioner, Surat City, Surat, respondent No. 2 herein. The petition was filed before this Court on 13.10.2005. When the matter was placed for hearing on 21.10.2005 this Court has issued rule. On behalf of the respondents Mr. L.R. Pujari, learned AGP, appears. With the consent of the parties the matter is taken up for final disposal.

2. Mr. Amrish Pandya, learned advocate, appears on behalf of Ms. Krishna U. Mishra, learned advocate for the petitioner. He has invited my attention to the order of detention dated 23.8.2005 in which the authority has passed order under the provisions of Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as “the PASA Act”). He has also invited my attention to the order of committal dated 23.10.2005 whereby the petitioner has been sent to Rajkot jail.

3. The learned advocate has also invited my attention to the grounds of detention supplied to the petitioner by the authority. The grounds of detention reveal that the authority has recorded statements of witnesses on 20.5.2005 as well as 12.6.2005 and other

material shown in the note and from the grounds it is alleged that the activities carried on by the detenu fall within “immoral traffic” as defined in Section 2(g) of the PASA Act. The grounds of detention further reveal that the detenu is an immoral traffic offender. He is carrying on such activity by taking on rent Flats at Belgiam Square, Japan Market, opp. Linear Bus Stand, Surat. The petitioner is engaged in the activity of immoral traffic by bringing girls and women from other cities to Surat and by supplying them to various customers in consideration of money and also providing rooms for the said purpose, he was running the business of prostitution and also earning his livelihood from the said income. It is also alleged in the grounds of detention that he is giving threats to the people who are coming on his way in such anti-social activities and also beating them in public and therefore are not coming forward to file any complaint against the detenu in public. Thus it has been alleged that the activities are directly causing or are likely to cause harm, danger to life, property and public health. It has been further alleged in the ground that immoral trafficking is resulting in spreading sexual disease including dangerous diseases like H.I.V. Aids etc., and there is no need of

any documentary evidence to prove that such activity is dangerous to public health particularly when there is sufficient material on record of the case to show that the detenu was involved in the anti-social activities of running brothel or involved in the offences of immoral trafficking. It was further stated in the ground of detention that with a view to immediately prevent him from continuing his such illegal activities in any manner prejudicial to the maintenance of public order and public health, after subjectively satisfying that such activities of the detenu cannot be curbed or prevented immediately by resorting to any other provisions of general law which would have been a time consuming process, as a preventive measure, the authority has passed order of detention against detenu under the PASA Act. This order was passed with a view to immediately prevent him from continuing such illegal and anti-social activities which are prejudicial to the maintenance of public order. The authority has passed the said order with full application of mind and in compliance and in consonance with the provisions of the PASA Act. It was further stated that all the relevant materials and vital documents which have a bearing on the aspect of the matter and which were available have been placed before

the authority. It was stated that copies of all the documents which have been considered and relied upon by the authority for passing the order of detention against the detenu have been supplied to the detenu along with the grounds of detention. It may be noted that in the grounds of detention the authority has relied on two statements of witnesses. The first statement was recorded on 9.7.2005 which was verified on 22.8.2005 and the second statement was recorded on 10.7.2005 which was verified on 22.8.2005.

4. The learned advocate for the petitioner has assailed the impugned order of detention on various grounds. He has stated that the grounds of detention reveal that the authority has alleged that the petitioner has committed an offence in the jurisdiction of Mahidharpura Police Station being II C.R. No. 390 of 2005 on 19.6.2005 under Sections 3, 4, 5 and 7 of the Prevention of Immoral Traffic Act and the petitioner was arrested on that day and cash of Rs. 2,660/-, 4 mobile phones, condoms 14 total valuing Rs. 13,660/- have been recovered from him. It is also alleged that the petitioner was released on bail on 22.6.2005 and the case is still pending.

5. The learned advocate has submitted that the order of detention is bad in law on the ground that the detaining authority has considered solitary offence which came to be registered against the petitioner which is not covered within the definition of Section 2(g) of the PASA Act. He has further stated that in any view of the matter, the activity alleged against the detenu can at the most be said to be the disturbance to law and order situation and not public order. In support of the aforesaid submissions, the learned counsel has relied on the provisions of PASA Act. Section 2(g) of the PASA Act provides that “immoral traffic offender” which means a person who habitually commits or abets the commission of any offence under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956). The learned advocate has heavily relied on the said definition particularly the word “habitual” in this regard. According to the learned advocate the word “habitually” means constant or continuous act. In support of the same, the learned counsel has relied on the judgement of the Hon'ble Supreme Court in the case of MUSTAKMIYA JABBARMIYA SHAIKH VS. M.M. MEHTA, COMMISSIONER OF POLICE & ORS. Reported in 1995(2) G.L.R. 1268 particularly

paragraph 8 of the said judgement where the Hon'ble Supreme Court has interpreted the word “habitually” as follows:

> “The Act has defined “dangerous person” in clause [c] of Sec. 2 to mean a person who either by himself or as a member or leader of a gang habitually commits or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act. The expression “habit” or “habitual” has, however, not been defined under the Act. According to The Law Lexicon by P. Ramanatha Aiyar, Reprint Edn. (1987), p. 44, “habitually” means constant, customary and addicted to specified habit and the term habitual criminal may be applied to anyone who has been previously convicted of a crime to the sentences and committed to prison more than twice. The word “habitually” means “usually” and “generally”. Almost similar meaning is assigned to the words “habit” in Aiyar's Judicial Dictionary, 10th Edn., p. 485. It does not refer to the

frequency of the occasions but to the invariability of practice and the habit has to be proved by totality of facts. It, therefore, follows that the complicity of a person in an isolated offence is neither evidence nor a material of any help to conclude that a particular person is a “dangerous person” unless there is material suggesting his complicity in such cases which lead to a reasonable conclusion that the person is a habitual criminal. It, therefore, necessarily follows, that in order to bring a person within the expression “dangerous person” as defined in clause © of Sec. 2 of the Act, there should be positive material to indicate that such person is habitually committing or attempting to commit or abetting the commission of offences which are punishable under Chapter XVI or Chapter XVII of I.P.C. Or under Chapter V of the Arms Act and that a single or isolated act falling under Chapter XVI or Chapter XVII of I.P.C. Or Chapter V of the Arms Act cannot be characterised as a habitual act referred to in Sec. 2(c) of the Act.”

6. It may be noted that relying upon the said judgement, the learned counsel submitted that the expression “habitually” means “repeatedly” or “persistently” and observed that it implies a thread of continuity stringing together similar repetitive acts but not isolated, individual and dissimilar acts.

7. As regards “public order”, the learned counsel has relied on the judgement of the Hon'ble Supreme Court in the case of PIYUSH KANTILAL MEHTA VS. COMMISSIONER OF POLICE reported in 1989(1) GLR 563)(SC) and also Division Bench judgement of this Court in the case of ASHOKBHAI JIVRAJ @ JIVABHAI SOLANKI VS. POLICE COMMISSIONER SURAT & ORS., reported in 2000(1) GLH 393. The contention of the learned advocate is that even activities of the petitioner amounts to violation of law and order situation but not public order. In support of the same, two decisions have been cited.

8. The second submission of the learned advocate is that the offence came to be registered against the petitioner on 19.6.2005 and the order of detention was passed on 23.8.2005. Thus there is a delay of two months

in passing the order and therefore the order of detention is bad in law. The learned counsel has relied on the judgement of the Hon'ble Supreme Court in the case of T.A. ABDUL RAHMAN VS. STATE OF KERALA reported in AIR 1990 SC 225 and also the decision in the case of ANAND PRAKASH VS. STATE OF U.P., reported in AIR 1990 SC 516 in support of the same. The learned counsel has also relied on the decision of the Hon'ble Supreme Court in the case of PRADEEP NILKANTH PATURKAR reported in AIR 1994 SC 656 and ELESH NADULAL PATEL reported in 1997(1) GLH 381 and THAKOR GIRISHJI reported in 2002(1) GCD 338.

9. The next contention of the learned advocate for the petitioner is that the statement of two anonymous witnesses were recorded by the sponsoring authority on 9.7.2005 and 10.7.2005 which came to be verified by the detaining authority on 22.8.2005 and on the very next day i.e. on 23.8.2005 the order of detention came to be passed which shows the mechanical exercise of power on the part of the detaining authority. The learned advocate therefore submitted that the privilege claimed by the detaining authority under Section 9(2) of the PASA Act is not genuine and proper. In support of the above submission, the learned advocate has relied on the

decision in the case of KALIDAS KAHAR reported in 1993(2) GLR 1659 and also the decision in the case of RANU BHIKABHAI BHARWAD reported in 2000(3) GLR 2696 particularly paragraph 6 of the said judgement.

10. The learned counsel has submitted that there is no contemporaneous material before the detaining authority and the authority has not verified about the character, antecedents and criminal background of the petitioner. The detaining authority has relied on the statements of the anonymous witnesses and thus the privilege claimed by the detaining authority by withholding the names and addresses of the witnesses under Section 9(2) of the Act is not genuine and proper. In support of the same, the learned advocate has relied on the judgement in the case of KAJALBEN SINDHI reported in 2000(1) GLH 320, KISHORE NAGIN PARMAR reported in 2000(4) GLR 3236 particularly paragraph 14 of the said judgement and KALIYO ALIAS NOOR MOHAMMAD reported in 1997(1) GLH 1017.

11. On the other hand, Mr. Pujari, learned AGP, appears on behalf of the respondents. It may be noted that this being an important matter and relating to

Immoral Traffic (Prevention) Act, 1956, this Court has requested Ms. Banna Datta to appear as amicus curie to assist this Court as this matter raises important question on interpretation of the provisions of the PASA Act along with the provisions of the Immoral Traffic (Prevention) Act, 1956. The learned AGP has first of all invited my attention to the provisions of the PASA Act particularly the object of the Act which provides an Act to provide for preventive detention of boot-leggers, dangerous persons, drug offenders, immoral traffic offenders and property grabbers for preventing their anti-social and dangerous activities prejudicial to the maintenance of public order. He has relied on Section 2(c) of the PASA Act which provides “dangerous person”. Section 2(g) of the PASA Act provides “immoral traffic offender” which I have quoted earlier. Section 3 of the PASA Act provides power of the State Government to pass order of detention against certain persons. Section 6 of the PASA Act provides grounds of detention severable. Section 9 of the PASA Act provides grounds of order of detention to be disclosed to detenu.

12. The learned AGP has also relied on Article 23 of the Constitution of India which provides prohibition

of traffic in human beings and forced labour.

> "(1) Traffic in human beings ad beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
>
> (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

13. The learned AGP has stated that in view of provisions of Article 23 of the Constitution The Immoral Traffic (Prevention) Act, 1956, an Act to provide in pursuance of the International Convention signed at New York on 9.5.1950 was enacted. Section 2 of the said Act provides definitions which are important. Section 2(a) of the said Act defines "brothel". Section 2(f) defines "prostitution" means the sexual exploitation or abuse of persons for commercial purpose and the expression

“prostitute” shall be construed accordingly. Section 2(g) provides “protective home”. Section 2(h) provides “public place”. Section 3 provides punishment for keeping a brothel or allowing premises to be used as a brothel. Section 4 of the said Act provides punishment for living on the earning of prostitution. Section 5 of the said Act provides procuring, inducing or taking person for the sake of prostitution. Section 6 of the said Act provides detaining a person in premises where prostitution is carried on. Section 7 of the Act provides prostitution in or in the vicinity of public places. Section 8 of the Act providing seducing or soliciting for purpose of prostitution. Section 9 of the Act provides seduction of a person in custody. Section 18 of the Act provides closure of brothels and eviction of offenders from the premises. Section 19 of the Act provides application for being kept in a protective home or provided care and protection by Court. Section 20 provides removal of prostitute from any place.

14. The learned AGP therefore submitted that the authority after taking into consideration this Act and with a view to prevent the activity, the petitioner has been detained under the provision of the PASA Act. The

authority has exercised the power conferred under PASA Act in passing the order. In support of the same, he has relied on the grounds of detention. The learned AGP has stated that it is not true that the authority has referred to only one evidence. If one reads the grounds of detention the authority has relied on the facts of Criminal Case No. 390 of 2005 and then it is alleged that the petitioner is carrying on anti-social activity and therefore he was a dangerous person carrying on immoral traffic act. The authority has also relied on the statement on 20.5.2005 by which it is alleged that the petitioner is carrying on the activity of immoral traffic and given various details. The authority has relied on another statement recorded on 12.6.2006 and thereafter it is alleged that the petitioner is carrying on activity of commission of offence under the provisions of suppression of immoral traffic in Women and Girls Act, 1956. The learned advocate further submitted that the grounds of detention has to be seen not in isolation of facts but in totality of the circumstances. The Court must consider not only the statement recorded but the statement of various women involved in the offence which is alleged against the petitioner. He has stated that along with the grounds the authority has also supplied the statement

recorded by two persons which has been referred in the grounds and also statement of Minaxiben @ Dipuben Rathod. In the said statement she has categorically stated that the petitioner is involved in carrying on the activity of immoral traffic act. The said statement of Minaxiben was recorded on 19.6.2005 which categorically states the activities carried on by the petitioner. On 20.6.2006 a further statement of Minaxiben @ Dipuben Rathod was recorded in which it is stated that the petitioner is carrying on business in immoral traffic act. Statements of Champaben w/o. Kalubhai Motibhai were also recorded on 19.6.2005 and 20.6.2005 which reveal that the petitioner is carrying on the business of prostitution.

15. The learned AGP has relied on the affidavit of Mr. Sudhir Sinha, the Commissioner of Police for the City of Surat. The said affidavit which is affirmed on 8.12.2005 in which it has been stated that the authority on receipt of the proposal along with the materials from the sponsoring authority for detention of the detenu, the authority examined and considered all those materials and also personally verified the genuineness, correctness and veracity of the incidents narrated in the statements of witnesses in the unregistered offences by calling the

said witnesses to the office. Thereafter the authority found that the said facts to be genuine and believable. It was further stated that on the basis of the said materials, the authority formulated the grounds of detention and all those grounds are true, correct, clear and proper. The authority has accordingly examined the documents relating to one case registered against the detenu and from those materials and from the statements of witnesses, it is clear that the detenu falls within the definition of “immoral traffic offender” as defined under Section 2(g) of the PASA Act. After examining the material on record the authority come to the conclusion that the detenu is an “immoral traffic offender” and by taking on rent of premises situated at 4th floor flat, Belgiam Square, Japan Market, Opp. Linear bus stand, Surat, by bringing young girls and women from other cities to Surat City and by supplying them to various customers in consideration of money and also providing rooms for the said purpose, the petitioner was running the business of prostitution and also earning his livelihood from the said income. It is also alleged that the petitioner is also giving threats to the people who are coming in his way in such anti-social activities and also beating them in public and therefore the people are

not coming forward to file any complaint against the detenu in public. Therefore, his activities are directly or even indirectly causing and are likely to cause harm, danger to life, property and health. It was further stated that the immoral trafficking is resulting in spreading of sexual diseases including dangerous disease like HIV Aids etc. There is no need of any documentary evidence to prove as such activity is dangerous to public health particularly when there is sufficient material on the record of the case to show that the detenu was involved in the anti-social activities of running brothel or involved in the offences of immoral trafficking. In view of the same, the authority has passed the order of detention under the provisions of the PASA Act with a view to prevent him from continuing his such illegal activities which are prejudicial to the maintenance of public order and public health and in compliance and in consonance with the provisions of the PASA Act as well as the Constitution of India and the said order is legal, valid and proper. The authority has further stated that all the relevant materials and vital documents which have a bearing on the aspect of the matter and which were available have been placed before the authority and copies of all those documents which

have been considered and relied on by the authority for passing the order of detention against the detenu have been supplied to the detenu along with the grounds of detention. Therefore, the contention raised by the detenu is not tenable at law.

16. It was further stated in the affidavit that all relevant and vital documents which have bearing on the aspect of the matter were placed before the authority and copies of all those documents which have been referred to and relied on by the authority for passing the order of detention have been supplied to the detenu along with the grounds of detention. It was further stated that the documents supplied to the detenu are certified true copies of the originals. It was further submitted that after careful scrutinizing and considering the materials placed before the authority and on personally verifying the genuineness, correctness and veracity of the incidents narrated in the statements of witnesses in the unregistered offences by calling the said witnesses to the office of the authority personally and after satisfying the authority that the fear expressed and the apprehension made by them is found to be quite real, proper, genuine and reasonable and after applying the

authority's mind to the facts of the case, the authority was subjectively satisfied that if the names and addresses and other particulars of the witnesses are disclosed to the detenu, their lives and properties will be in danger, and therefore the privilege under Section 9(2) of the PASA Act is claimed. It was stated that the witnesses were not ready and willing to come forward to register any complaint against the detenu because of fear and apprehension of insecurity to the lives and properties of the witnesses and their family members. It was therefore stated that the claim of privilege for not disclosing the identity of the witnesses to the detenu is genuine and claimed with bona fide exercise of power and there is no violation of the fundamental rights of the detenu guaranteed under Article 22(5) of the Constitution of India.

17. The authority, therefore, submitted that the witnesses have requested the authority not to disclose their identity to the detenu. In view of the same, the order of detention detaining the detenu was passed by authority under the provisions of the PASA Act after taking into consideration all the materials placed before the authority and after applying the authority's mind to

the facts of the case properly the authority was fully and subjectively satisfied that the detenu is an immoral traffic offender and the public order is disturbed by his such activities and hence it is necessary to detain the detenu and therefore the authority has passed order under the provisions of PASA Act against the detenu with a view to immediately prevent him from continuing such activities and from acting in any manner prejudicial to the maintenance of public order and public health and the said order is passed with full application of mind and in compliance and in consonance with the provisions of the PASA Act as well as various articles of the Constitution of India and the said order is legal, valid and proper. It was therefore stated that the privilege under Section 9(2) of the PASA Act is claimed by the authority with proper application of mind to the material placed before it, facts and circumstances of the case as well as legal provisions applicable to the facts of the case and therefore the same is legal, valid and proper.

18. It was further stated in the affidavit that the last offence was registered against the detenu on 19.6.2005 and the petitioner was arrested on the same day and released on 2.6.2005. It was stated that thereafter

the sponsoring authority has collected necessary information and materials and recorded the statement of witnesses on 9.7.2005 and 10.7.2005 and the proposal was submitted on 11.7.2005 which was received by the authority on 16.8.2005. On receipt of the same, the authority verified the genuineness and correctness of the statements of the witnesses and incidents narrated by them in it by calling the witnesses to the office on 22.8.2005 and on carefully considering the material placed before the authority, facts and circumstances of the case as well as legal provisions applicable to the facts of the case, since the authority was subjectively satisfied that the detenu is an immoral traffic offender and his anti-social activities have the potential to disturb the public order and therefore it is necessary to detain him immediately with a view to prevent him from acting in any manner prejudicial to the maintenance of public order, the authority has passed the order of detention against the detenu on 23.8.2005. Therefore, there is no delay in passing the order of detention.

19. As regards solitary incident, the learned AGP, has stated that though the order only states one solitary aspect, but if one looks the entire grounds of detention

then it shows the magnitude of activity disclosed by the detenu. He has also referred to some of the statements of the witnesses which I have already referred. This also shows the magnitude the activity disclosed by the witnesses. In view of these peculiar facts and circumstances of the case, if the authority has relied on this and passed the order the same is in consonance of the provisions of the detention law. In support of the same, he has relied on the judgement of this Court in the case of AMANULLAKHAN KUDRATALLAKHAN PATHAN VS. STATE OF GUJARAT & ORS., reported in 1999(1) G.L.H. 1003 particularly paragraph 18 on page 1007 where the learned Single Judge has observed thus:

> “There may be several reasons for not registering the said offences with the police. The extreme fear in the mind of the witness may be one factor as has been disclosed by the two confidential witnesses in the instant case. Likewise out of several other considerations, for example, fear to the life and property of the witnesses or the victims and fear of damage likely to be caused to the reputation of such victims to approach the police for registering

the case may be the reasons why commission of such offences is not reported to the police. Thus, registration of cases was no intention of the legislature while enacting Section 2(c) to treat it as condition precedent. On the other hand the provision under this Section is habitually commission of offence and if repetition of such activity was noticed by the Detaining Authority (i) in the registered offence and (ii) in the incidents narrated by two confidential witnesses, it can be said that there was sufficient material before the Detaining Authority to reach subjective satisfaction that the petitioner was habitually committing offences punishable under Chapters VI and XVII IPC. It has also been made out from the grounds of detention that the petitioner is a member of Latif gang and he was committing such offences not alone but as member of Latif gang in the company of his companions. In this view of the matter requisite ingredients of Section 2(c) of PASA are made out in the instant case, hence, the subjective satisfaction of the Detaining Authority in

declaring the petitioner as dangerous person requires no interference nor such subjective satisfaction is vitiated in the eye of law."

20. Further in paragraph 20 of the said judgement the learned Judge has interpreted Section 3(4) of the PASA Act as follows:

"xxxx The concept public order and the definition of public order in Section 3(4) and explanation appended thereto under PASA makes it clear that even deeming provision has been made in this behalf by the legislature and extended meaning of disturbance of public order is that public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely inter alia <u>if any of the activities of any person referred to in this sub-section directly or indirectly is causing or is likely to cause any harm, danger or alarm or feeling of insecurity amongst the general public or any section thereof or grave or widespread danger to life, property or public health</u>. The person indulging in such activities can be said

to have involved in the activities prejudicial for maintenance of public order."

21. Thereafter after referring in paragraph Nos. 21 and 22 of the said judgement about the statement of those witnesses recorded, in paragraph No. 23, the learned Judge has further observed as under:

"Thus considering the magnitude of the two activities disclosed by the two confidential witnesses it can be said that public order was certainly disturbed by the activities of the petitioner."

22. From the said judgement appeal was filed before the Hon'ble Supreme Court and the matter was carried to Hon'ble Supreme Court in the judgement reported in the case of Amanulla Khan Kudeatalla Khan Pathan Vs. State of Gujarat reported in AIR 1999 SC 2197 while confirming the judgement of this Court while considering the word "habitually" in paragraph No. 4 on page 2199 has observed as follows:

"The expression "habitually" would obviously

mean repeatedly or persistently. It supplies the threat of continuity of the activities and therefore, as urged by the learned counsel for the petitioner an isolated act would not justify an inference of habitually commission of the activity. In this view of the matter the question that requires adjudication is whether the satisfaction of the detaining authority in the present case is based upon the isolated incident for which the criminal case was registered or there are incidents more than one which indicate a repeated and persistent activity of the detenu. Xxxxxxxxxx

In fact the grounds of detention clearly mention the aforesaid state of affairs and there is no bar for taking these incidents into consideration for the satisfaction of the detaining authority that whether the person is a “dangerous person” within the ambit of Section 2(c) of the Act. We, therefore, fail to appreciate the first contention raised by the learned counsel for the petitioner that the satisfaction of the detaining authority that the detenu is a “dangerous person” is based

upon the solitary incidence in respect of which a criminal case has already been registered. In our considered the three different incidents happened on three different dates and not a solitary incidence and, therefore, the test of repeatedness or continuity of the activity is fully satisfied and the satisfaction of the detaining authority holding the detenu to be a "dangerous person" is not vitiated in any manner. The contention of the learned counsel for the petitioner therefore stands rejected."

23. In view of the judgement of this Court which has been confirmed by the Hon'ble Supreme Court, the learned AGP stated that this Court may not interfere with the order passed by the detaining authority.

24. The second contention raised by the petitioner regarding non-disclosure certain vital facts by the detaining authority. It is the case of the petitioner that as the authority has not supplied certain vital facts, his right to make an effective representation is vitiated. In this regard the learned AGP, has invited my attention to the grounds of details as well as the

affidavit filed by the authority in this case for which I have made a reference. He has stated that when the authority has supplied the details to the detenu, the same was sufficient to make an effective representation under Article 22(5) of the Constitution and thereafter the authority has filed affidavit and that will satisfy the contention of the petitioner in this behalf. To appreciate this contention he has relied on the Division Bench judgement of the Bombay High Court in the case of BALKRISHNA KASHINATH KHOPKAR VS. THE DISTRICT MAGISTRATE, THANA reported in 58 BLR 614 where on page 618 the Court has observed as under:

> “We should have expected the District Magistrate either to have applied his mind to the grievance of the petitioner and state that each one of the particulars required by the petitioner denied to him in public interest or he should have frankly admitted that some of the particulars could not be denied to him in public interest but for other reasons, those particulars were not supplied. But this general, unspecific and bald averment of public interest is not what the Constitution or the

law requires. Although the question of public interest is justiciable and although the Constitution and the Act has left it to the detaining authority to decide what facts should be withheld, the Court must at least be satisfied that the authority has applied its mind and has come to the conclusion with regard to public interest bona fide and not arbitrarily or capriciously."

25. Another judgement on which reliance has been placed by the learned A.G.P. is of a Division Bench judgement in the case of BAI AMINA W/O. IBRAHIM ABDUL RAHIK ALLA VS. STATE OF GUJARAT AND OTHERS reported in 22 GLR 1186. The Division Bench stated that where the detaining authority's privilege under Article 22(6) to withhold facts and particulars disclosure of which it considers to be against public interest delicate balance to be maintained between public interest dictating non-disclosure and public interest requiring disclosure – privilege of non-disclosure to be exercised sparingly and in those cases only where the former overrides the latter. Satisfaction of the detaining authority in that behalf arrived at on consideration of all the relevant

aspects essential and looking to the facts of the case exercise of privilege has to be considered. In view of this principle Mr. Pujari, learned AGP, stated that when the authority has considered the same in the interest of public and therefore the authority has rightly sought the privilege in this behalf.

26. It may be noted that the question arose before this Court as to whether the judgment in the Bai Amina case (supra) is not a good law inasmuch as it is inconsistent with the decision of Bombay High Court in Balkrishna Kashinath Khopkar's case (supra) and whether the ratio of the decision in Bai Amina's case (supra) does not laid down the good law. For that purpose the Full Bench was constituted and the Full Bench of this Court (Coram: G.T.Nanavati (as he was then), J.N.Bhatt and S.M.Soni, JJ.) constituted and the order has been reported in 35(1) GLR 761 in the case of CHANDRAKANT N.PATEL Vs. STATE OF GUJARAT AND OTHERS. The Full Bench in para 7 after examining both the judgments has observed in para 7 on page 766-767 as under:

> “Thus, the said observation came to be made by the Court in Balkrishna's case keeping the

detenu in mind while the observation which has been made by this Court in Bai Amina's case is with reference to the nature and extent of the constitutional right of the detenu when he is detained by way of preventive action. In a case where a person is detained by way of a preventive action, it is the liberty of an individual detenu which is involved and in that sense, it can be said that it is a matter of private interest and not public interest. But the right of the person so detained is recognised as a fundamental right by the Constitution and taking away of such right can only be in public interest. Adversely affecting liberty and such a right, therefore, can properly be regarded as a matter of public interest. We are, therefore, of the opinion that there is no inconsistency between the ratio of the division bench decision in the case of Balkrishna and the ratio of the decision of the division bench in the case of Bai Amina. We are also of the opinion that even otherwise also, it cannot be said that Bai Amina's case does not lay down good law. As

stated above, the observation which have been made as to when and how the privilege can be claimed are made with a view to show what can be regarded as proper application of mind to all the relevant aspects; what can be regarded as sufficient for the purpose of claiming privilege; and, when exercise of the privilege can be regarded as bona fide. Whether that privilege has been exercised bona fide and properly or not obviously will have to be decided in each case by reference to the facts of that case. In the case of Balkrishna and also in the case of Bai Amina it has been so held. Considering the law relating to preventive detention, the nature of the right conferred on the detenu and the circumstances under which that right can be adversely affected, we do not think that what has been held in Bai Amina's case is not good law. Whether the detaining authority can be said to have applied its mind to all the relevant aspects properly or not would be a question of fact in each case and will have to be decided with reference to the facts of that case. Since

the satisfaction in this behalf has to be of the detaining authority, obviously, the promise of confidentiality given by the person recording the statement cannot by itself be regarded as sufficient ground for withholding the disclosure of such particulars and materials. But if, after considering the general background, character, antecedent, criminal tendency or propensity, etc., of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then it cannot be said that the same was not done in public interest, and that public interest likely to be subserved by non-disclosure did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the detenu."

27. The learned AGP, has also invited attention of this Court to Article 23 of the Constitution of India . Article 23 of the Constitution provides right against

exploitation. This article provides prohibition of traffic in human beings and forced labour. The learned AGP has relied on the judgement of the Hon'ble Supreme Court in the case of VISHAL JEET VS. UNION OF INDIA reported in AIR 1990 SC 1412 where the said article has been interpreted by the Apex Court. In paras 5, 6, 7 and 11 the Hon'ble Supreme Court has referred to the historical background of Suppression of Immoral Traffic in Women and Girls Act and other related legislation. In para 11A on page 1416 of the said judgement the Apex Court has observed as under:

27A "In spite of the above stringent and rehabilitative provisions of law under various Acts, it cannot be said that the desired result has been achieved. It cannot be gainsaid that a remarkable degree of ignorance or callousness or culpable indifference is manifested in uprooting this cancerous growth despite the fact that the day has arrived imperiously demanding an objective multi-dimensional study and a searching investigation into the matter relating to the causes and effects of this evil and requiring most rational measures to weed

out the vices of illicit trafficking. This malady is not only a social but also a socio-economic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive."

27B In paragraph 15 on page 1416 of the said judgement the Apex Court has issued certain directions:

"We, after bestowing our deep and anxious consideration on this matter feel that it would be appropriate if certain directions are given in this regard. Accordingly, we make the following directions:

27C `1. All the State Governments and the Governments of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.'

27D Thereafter in para 17 on page 1417 the Hon'ble

Supreme Court has observed as under:

> “We hope and trust that the directions given by us will go a long way towards eradicating the malady of child prostitution, devadasi system and jogin tradition and will also at the same time protect and safeguard the interest of the children by preventing the sexual of abuse and exploitation.”

28. It may be noted that the learned AGP has also relied on the judgement of the Hon'ble Apex Court in the case of GAURAV JAIN VS. UNION OF INDIA & OTHERS reported in (1997) 8 SCC 114 where the Hon'ble Court (Coram: K. Ramaswamy and D.P. Wadhwa, JJ) has examined the provisions of Immoral Traffic (Prevention) Act and in para 17 on page 126 the Hon'ble Court has observed as under: (per K. Ramaswamy, J)

28A “Section 2(a) of the Immoral Traffic (Prevention) Act, 1956 (for short “the ITP Act”) defines “brothel” to mean any house, room, conveyance or place or any portion of any house, room, conveyance or place which is used for purpose of

sexual exploitation or abuse, for the gain of another person or for the mutual gain of two or more prostitutes. The essential ingredient, therefore, is a place being used for the purpose of sexual exploitation or abuse. The phrase “for the purpose of” indicates that the place being used for the purpose of the prostitution may be a brothel provided a person uses the place and asks for girls, where the person is shown girls to select from and where one does engage or offer her body for promiscuous sexual intercourse for hire. In order to establish prostitution, evidence of more than one customer is not always necessary. All that is essential to prove that a girl/lady should be a person offering her body for promiscuous sexual intercourse for hire. Sexual intercourse is not an essential ingredient. The inference of prostitution would be drawn from diverse circumstances established in a case. Sexuality has got to be established but that does not require the evidence of more than one customer and no evidence of actual intercourse should be adduced or proved. It is not necessary that there should be repeated

visits by persons to the place for the purpose of prostitution. A single instance, coupled with the surrounding circumstances may be sufficient to establish that the place is being used as a brothel and the person alleged was so keeping it. The prosecution has to prove only that in a premises a female indulges in the act of offering her body for promiscuous sexual intercourse for hire. On proof thereof, it becomes a brothel."

28.B Then in paragraph 19 on page 128 the Hon'ble Court has observed as under:

"Therefore, prostitution is not confined, as in the ITP Act, to offering of the body to a person for promiscuous sexual intercourse. Normally, the word "prostitution" means an act of promiscuous sexual intercourse for hire or offer or agreement to perform an act of sexual intercourse or any unlawful sexual act for hire as was the connotation of the Act. By amendment the act of a female and exploitation of her person by an act or process of exploitation for commercial purpose making use of or working up for exploitation of the person of the women taking unjust and unlawful

advantage of trapped women for one's benefit or sexual intercourse has been brought within its frame. The word “abuse” has a very wide meaning – everything which is contrary to good order established by usage amounts to abuse. Physical or mental maltreatment also is an abuse. An injury to genital organs in an attempt of sexual intercourse also amounts to sexual abuse. Any injury to private parts of a girl constitutes abuse under the JJ Act. “Public place” means any place intended for use by, or accessible to the public and includes any public conveyance. It is not necessary that it must be public property. Even if it is a private property, it is sufficient that the place is accessible to the public. It must be a place to which the public, in fact, resorts or frequents.”

28.C Then in para 21 and 27 the Hon'ble Court has observed as under:

“The three Cs, viz., counselling, cajoling and coercion are necessary to effectively enforce the provisions of ITP Act and JJ Act. By order dated 2.5.1990, this Court, after hearing the counsel,

passed an order to set up an Advisory Committee to make suggestions for eradicating child prostitution and to point out social aspects for the care, protection, treatment, development and rehabilitation of the young victims, children and girl prostitutes from red-light area and get them freed from the abuses of prostitution; to amend the existing law or to enact a new law, if so warranted; to prevent sexual exploitation of children and to take various measures for effective enforcement thereof. It is seen that the Committee constituted by this Court under the chairmanship of Shri V.C.Mahajan travelled far and wide to have a look into the field of operation of the governmental agencies and has suggested nodal programme for the eradication of the twin facets of prostitution, viz., protection, care and rehabilitation of the fallen women and neglected juveniles. The Committee has opined that the problem of child prostitution does not stand by itself and is a component of overall phenomenon in the country. It highly concentrates on identified red-light areas as well as on areas which are not so clearly

identified. Though the problem of prostitution is mainly found in large cities, but in the urban areas and some rural areas, the problem finds frequent recurrence. Among the fallen women, the child prostitutes constitute a major bulk of the component. Child prostitutes constitute 12 to 15% of the prostitutes in any area. On account of the social sanctions, women are exploited by the monstrous customs of Devadasis, Jogins and Venkatasins known by other names in different parts of the country. The unfounded social and religion-based sanctions are only a camouflage; their real motive is to exploit the unfortunate women. Most of them belong either to Scheduled Castes or Backward Classes coming from socio-economically lower groups. They are prevalent highly in Karnataka, Maharashtra and Andhra Pradesh. The specific areas in major cities are identified as red-light areas as well as some semi-urban but rural areas. The number of red-light areas having increased in recent times, brothel-based prostitution is on the wane but there is an increasing trend towards decentralised mode of prostitution. 76% of the

fallen women hail from Andhra Pradesh, Karnataka, Tamil Nadu, West Bengal, Bihar, Maharashtra, Uttar Pradesh, Assam, Gujarat, Goa, Madhya Pradesh, Kerala, Meghalaya, Orissa, Punjab, Rajasthan and Delhi. Delhi receives prostitutes from about 70 districts in the country; Bombay from 40 districts; Bangalore from 70 districts; Calcutta from 11 districts, Hyderabad from 3 districts etc. There is growing evidence that the minimum number of prostitutes get into flesh trade either voluntarily or by organised gangsters who force women and girls by offering rosy future to innocent fallen women and trap them often with the connivance of the police."

28D "Women found in the flesh trade should be viewed more as victims of adverse socio-economic circumstances rather than as offenders in our society. Prostitution in five-star hotels is a licence given to persons from higher echelons. The commercial exploitation of sex may be regarded a of as a crime but those trapped in custom-oriented prostitution and gender-oriented prostitution should be viewed as victims of

gender-oriented vulnerability. That could be arrested by not only law-enforcing but by constant counselling and interaction by the NGCs impressing upon them the need to shed off the path and to start with a new lease of life. The ground realities should be tapped with meaningful action imperatives, apart from the administrative action which aims at arresting immoral traffic of women under the ITP Act through inter-State or Interpol arrangements and the nodal agency like the CBI is charged to investigate and prevent such crimes. We are concerned in this case more with the rehabilitation aspect than with prevention of the crime. Therefore, we emphasise on the review of the relevant law in this behalf, effective implementation of the scheme to provide self-employment, training in weaving, knitting, painting and other meaningful programmes to provide the fallen women regular source of income by self-employment or, after vocational education, the appropriate employment generating schemes in governmental, semi-governmental or private organisations."

28.E The Hon'ble Court has made certain guidelines in this behalf. However, because of the subsequent development, I do not quote the guidelines in this behalf. However, in the said judgment, Hon'ble Mr.Justice Wadhwa, who is another Judge has also given concurrent judgment, but in paragraph 61 the learned Judge has observed like this.

28F "Thus considering the substratum of the judgement prepared by my learned brother relating to children of the prostitutes and establishment of juvenile homes I would concur with the directions being issued by him in his Order. I would, however, record my respectful dissent on the question of prostitution and the directions proposed to be issued on that account and also, in the circumstances of the case, what my learned brother has to say on the directions proposed to be issued referring to the provisions of Articles 142 and 145(5) of the Constitution."

29. From the aforesaid judgement it may be noted that Hon'ble Mr. Justice Ramaswami has dealt with the

question in detail and given certain directions. However, another Hon'ble Mr. Justice Wadhwa has in paragraph 61 of his separate/concurrent judgement stated that he has agreed with with the directions relating to establishment of juvenile homes issued by Hon'ble Mr. Justice Ramaswamy. However, on the other aspect, the Hon'ble Mr. Justice Wadhwa has not agreed with directions given by brother Justice Ramaswamy on other aspects.

30. The matter was reviewed by three Judge Bench of the Hon'ble Supreme Court and the judgement was reported in (1998) 4 SCC 270 [GAURAV JAIN VS. UNION OF INDIA & OTHERS] where the Hon'ble Supreme Court in para 12 of the judgement has observed as under:-

30A “We, therefore, allow this review petition. The directions given by the learned Judge relating to prostitution and/or its amelioration or eradication are set aside. This, however, should not be understood as preventing the Union or State Governments from formulating their own policies in this area or taking measures to implement them. His observations relating to the use of Article 142 in this

connection are also set aside and the question of giving any directions in relation to prostitution, its eradication or amelioration will have to be placed before a larger Bench if any directions are required to be given in that connection by this Court. The matter should be placed before the Hon'ble the Chief Justice for considering whether a larger Bench should be constituted for this purpose".

30B In view of the aforesaid judgement of the Hon'ble Supreme Court in the case of GAURAV JAIN VS. UNION OF INDIA & OTHERS (supra) which I have referred – directions of Hon'ble Mr. Justice Ramaswamy and the observations of Hon'ble Mr. Justice Wadhwa and when the review application has been filed, the matter has been heard..... where the Hon'ble Supreme Court has set aside the directions relating to prostitution. However, the Hon'ble Supreme Court has made it clear that it will be open for the Union or the State Governments to formulate their own policies in this area or taking measures to implement them. Thereafter, three Judge Bench of the Hon'ble Supreme Court has directed the matter to be placed before Constitution Bench. However, in the

knowledge of this Court and the learned advocate who appears before this Court has informed that there is no constitution of the Bench in this behalf.

31. However to the knowledge of this Court still Constitution Bench has not decided the matter.

32. The learned AGP has also relied on the judgment of this Court in the case of SAHYOG MAHILA MANDAL & ANR. VS. STATE OF GUAJRAT & ORS., reported in 45(2) GLR 1764.

33. The Division Bench of this Court has made some significant observations particularly paras 7, 7.1, 7.2, 8, 8.1, 8.2, 8.3, 8.4, 9.6 and 10 regarding the right of privacy of prostitutes which reads as under:

> "7. It was contended on behalf of the petitioners that prostitution is exercise of fundamental right of women to practice any profession or carry on any occupation, trade or business and it should be open for the women to reside in their homes in Chakla Bazaar and carry on their profession. Since prostitution was not per se illegal, total restriction on

the fundamental right of the prostitutes as imposed by the notification issued under Section 7 (1) (b) and the police action taken against them by raiding their premises were unwarranted and unconstitutional.

7.1 There has been a considerable acrimonious debate over the question: Is prostitution a form of exploitation to be abolished or an occupation to be regulated ? The question is no longer about morality: is prostitution a vice and are those involved evil or lacking in morals ? There are basically two camps, those seeking to eradicate prostitution and those who view the women involved as sex workers. The Court has to steer through the non-legal aspects of the debate, because, what social standards should be reflected in the laws in the matter of prostitution is in the legislative domain.

7.2 Prostitution in the modern times is not confined to street walking and its forms are diversified into various kinds, such as prostitution services, including date clubs, various kinds of services in

adult entertainment, business facilities, meet and mate on the internet etc. Pornography acts as an arm of prostitution and often women coerced into pornography are coerced into prostitution.

8. Economic crisis, natural diseases, political unrest and conflict situations make women and children more vulnerable and easy prey to sex traffickers and recruits. The term "sex worker" does not dignify the women involved though it may dignify the pimps, procurers and traffickers who can call themselves "managers", "supervisors" and "organisers". Prostitution for women is considered not merely a temporal activity but rather a heavily stigmatized social status which in most societies remains fixed on them regardless of any improvement in behaviour. In a study of street prostitutes in Toronto, approximately 90% of women contacted indicated that they wished to stop working on the streets at some point of time, but felt unable or unclear about how to even begin the process, (see Prostitution and Civil Rights by

Cataharine A. MacKinnon, Michigan Journal of Gender & Law, 1993, Volume 1:13-31). Often women who themselves view sex service as a temporary and part-time engagement are forced by legal and social labelling to remain prostitutes and to bear that status in all the walks of their life. Prostitutes epitomise social illegitimacy and are designated as a fair game for police scrutiny and social attack. If prostitutes by circumstances regulated by commercial interests of the middlemen and organizers cannot leave, they remain as sexual slaves. Women in prostitution usually begin their career due to poverty and are kept indebted and poor by pimps and other middlemen who control their earnings and movements making them a legal non-person in a biased society. Article 23 of the Constitution of India prohibits traffic in human beings, beggar and other similar form of forced labour. The victim of prostitution is the prostitute herself who is placed in a slave-like condition and subjected to virtually unlimited authority of others in the trade for rendering distinctly personal

service. Through contrived and manipulated indebtedness to which she gets subjected, she is unable to ward off the shackles of poverty and inch towards a dignified living. Servitude results from indebtedness and poverty. The victims of the vice of prostitution believe that they have no viable alternative but to continue in the field of their exploitation for survival. Poverty and indebtedness make exit from prostitution impossible for such women. This condition of involuntary servitude of most of the women and girls in prostitution, where their distinctly personal services are bought and sold as chattel, would justify the Courts and other constitutional authorities in viewing prostitution as a form of modern slavery and its perpetrators, pimps and traffickers as exploiters of the victim prostitutes in violation of their right against exploitation guaranteed by Article 23.

8.1 Our constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these

aspects is the fundamental dignity of human body which is not simply organic. The very nature of commodifying the human body devalues the respect that the Constitution regards as inherent in the human body by guaranteeing fundamental right against exploitation under Article 23 and by issuing directives under Articles 39 (e) and 46 that the State should strive towards securing that, health and strength of men and women are not abused and citizens are not forced to enter avocations unsuited to their age or strength and to promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice and all forms of exploitations.

8.2 The most potent rejoinder against recognition of the degrading practice of prostitution, which undermines womanhood itself, comes from Article 51-A (e) of the Constitution, which ordains that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women.

The fact that prostitution is a practice derogatory to the dignity of women is universally recognized and is clearly reflected from the "Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others", to which India was a signatory having signed it on 9.5.1950 and which was ratified on 9.5.1953. The Convention was approved by the General Assembly of the United Nations in its Resolution 317 (IV) of 02 December, 1949. The preamble of the Convention records that:

"....prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community....." (emphasis added).

8.3 The parties to the Convention agreed under Article 1 to punish any person who, to gratify the passions of another, procures, entices or leads away, for purposes of prostitution, another person, even with the

consent of that person, or exploits the prostitution of "another person", even with the consent of that person. The "Convention on the Elimination of all Forms of Discrimination Against Women of 1979" provided in Article 6 that State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. The General Assembly of the United Nations passed a Resolution on 16.12.1983 (A/RES/38/107) in its meeting No.100 reaffirming the objectives of the United Nations Decade for Women: Equality, Development and Peace, bearing in mind, "the essential role of women in the welfare of the family and the development of society" and "considering that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community", urged the Member States "to take all appropriate humane measures, including legislation, to combat prostitution,

exploitation of the prostitution of others and all forms of traffic in persons and to provide special protection to victims of prostitution through measures including education, social guarantees and employment opportunities for those victims with a view to their rehabilitation".

8.4 To recognize prostitution as a legitimate means of livelihood would be an open invitation to trafficking in women which is shunned internationally and in all the civilized nations of the world. "Trafficking in women and girls is one of the most corrosive forms of violation of human rights. It results in gradual total destruction of a woman's personal identity, and her right to live as a free human being in a civilized society. The victim is subjected to violence, total humiliation and violation of personal integrity. The victim of such devastating violence may also end up with life-threatening HIV/AIDS/STD or a lifetime of trauma, drug addiction or personality disintegration. It is a denial of the right to liberty and security

of person, the right to freedom from torture, violence, cruelty or degrading treatment, the right to a home and a family, the right to education and employment, the right to health care - everything that makes for a life with dignity. Trafficking has been rightly referred to as a modern form of slavery". (See Consultation Paper on "TRAFFICKING IN WOMEN AND GIRLS" by Justice Sujata Manohar for the Expert Group Meeting on "Trafficking in women and girls" 18-22 November 2002 Glen Cove, New York, USA).”

9.6 The restriction on personal liberty by Sec.7 is in the interests of general public and is imposed by law enacted by the Parliament in the background of the Convention for Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others signed and ratified by India, and the deprivation of liberty to carry on prostitution in public places is as per the procedure established by law. Therefore, there is no violation of the fundamental right to life and personal liberty of persons guaranteed by Art.21 of the

Constitution.

10. It was argued that the right to privacy gets violated every time the law enforcing agencies barge in the precincts of the premises in their occupancy, and therefore, the provisions of Sec.15 read with Sec.7 of the Act enabling the police to search the premises in which prostitutes may be living violate Art.21 of the Constitution."

CONCLUSION & FINDINGS:

34. As regards first contention regarding habitual offence to be considered, I have considered the judgment of the Hon'ble Supreme Court in the case of Mustakmiya Jabbarmiya Shaikh (supra), Piyush Kantilal Mehta (supra) and other cases in this behalf. However, I have also considered Articles 23 of the Constitution of India and other provisions of Immoral Traffic (Prevention) Act and also the affidavit filed by the respondent and the judgment of this Court in Amanullakhan Kudratallakhan Pathan (supra) which I have referred while considering the contention of learned AGP which has been confirmed by the Hon'ble Apex Court in the case reported in AIR 1999 SC 2197. In my view the first contention raised by the

petitioner has no substance.

35. As regards the second contention that in this case offence is committed on 19.6.2005 and the order is passed on 23.8.2005 and there was a delay of two months, I consider the authority after registering the same has recorded statement of witnesses on 9.7.2005 and 10.7.2005 and the same was verified on 22.8.2005 and thereafter passed the impugned order in this behalf. In view of the same, there is no delay in passing the order.

36. As regards contention of the learned advocate for the petitioner that the authority claimed privilege under Section 9(2) of the PASA Act is not proper and not genuine. I have considered the facts and circumstances of the case and also considered the grounds of detention and the statements of the witnesses. In my view the authority is in right in claiming privilege under Section 9(2) of the Act. I have also considered the judgement of Division Bench of this Court as well as Full Bench of this Court. While claiming privilege from those judgements whether the detaining authority can be said to be considered all the relevant material properly or not, the question will have to be decided with reference to the facts of the

case. As regards premises potential given by the user regarding statement is concerned, one has to consider general background, character.

37. The other contention which has been taken is that the offence committed by the petitioner does not fall within the ambit of Section 2(g) of the PASA Act and the activity of disturbance of law and order and not public order. If one has to consider the magnitude of offence which affects a large number of people. In my view the authority has considered all these aspects properly and there is no violation of fundamental right of the petitioner.

38. This petition raises an important question of interpretation of Immoral Traffic (Prevention) Act. For that purpose, I want to observe as under:

38.1 The purpose of the Act was to inhibit or abolish commercialized “vice”. It was not to render prostitution per se a criminal offence or to punish a woman merely because she prostitutes as clearly indicated in the definition of brothel which has been given in the Act.

38.2 Section 2(a) “brothel” includes any house, room or place which is used for purposes of sexual exploitation or abuse for the gain of another person or the mutual gain of two or more prostitutes.

38.3 Thus, where a single person practices prostitution for his or her own livelihood without another prostitute or some other person being involved in the maintenance of such premises, his or her residence will not amount to “brothel”.

38.4 Moreover, the amendment in the law in 1986 has amended the definition of “prostitution” (i.e. the act of a female offering her body for promiscuous sexual intercourse for hire whether in money or in kind, or whether offered immediately or otherwise) and replaced it by the following new definition “prostitution” means the sexual exploitation or abuse of persons (male or female) for commercial purposes, and the expression “prostitute” will be construed accordingly.

38.5 This new definition clearly implies that those who have to be punished under the Act are those who exploit persons through prostitution.

38.6 Most of the provisions of the Act are intended to punish the brothel keepers, the pimps, those who live on the earnings of prostitution of another person and those who are involved in the trafficking of persons for the purpose of prostitution.

38.7 The Hon'ble Supreme Court in the case of VISHALJEET VS. UNION OF INDIA AND OTHER STATES AND UNION TERRITORIES reported in (1990) 3 SCC 318 has observed in para 11 as under:

> “With the growing danger in society to healthy and decent living with morality, the world public opinion congregated at New York in a convention for suppression of traffic in persons for exploitation for immoral purposes. Pursuant to the signing of that convention on May 9, 1950, our Parliament has passed an act called “Suppression of Immoral Traffic in Women and Girls Act, 1956” which is now changed as “the Immoral Traffic (Prevention) Act, 1956” to which certain drastic amendments are introduced by the Amendment Acts of 46 of 1978 and 44 of 1986. This Act aims at suppressing the evils of prostitution in women and girls and achieving a

public purpose viz., to rescue the fallen women and girls and to stamp out the evils of prostitution and also to provide an opportunity to these fallen victims so that they could become decent members of the society. Besides the above Act, there are various provisions in the Indian Penal Code such as Sections 366A (dealing with procuration of minor girl), 366B (dealing with offence of importation of girl from foreign country), 372 (dealing with selling of minor for purposes of prostitution etc.) and 373 (dealing with the offence of buying minor for purposes of prostitution etc.). The Juvenile Justice Act, 1986 which provides for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles contains a specific provision namely Section 13 which empowers a police officer or any other person or organisation authorised by the State Government in this behalf to take charge of any neglected juveniles and bring them before the Board constituted under this Act which Board under Section 15 has to hold an enquiry and make such orders in relation to the neglected juveniles as it may deem fit.

38.8 The Hon'ble Supreme Court has referred to the present Act and also the provisions of the I.P.C., and further observed in paras 13 and 14 thus:

> “para 13 – In our view, it is neither practicable and possible nor desirable to make a roving enquiry through the CBI throughout the length and breadth of this country and no useful purpose will be served by issuing any such direction, as requested by the petitioner. Further, this malignity cannot be eradicated either by banishing, branding, scourging or inflicting severe punishment on these helpless and hapless victims most of whom are unwilling participants and involuntary victims of compelled circumstances and who, finding no way to escape, are weeping or wailing throughout.”

> “para 14 -The devastating malady can be suppressed and eradicated only if the law enforcing authorities in that regard take very severe and speedy legal action against all the erring persons such as pimps, brokers and brothel keepers. The Courts in such cases have

to always take a serious view of this matter and inflict condign punishment on proof of such offences. Apart from legal action, both the Central and State Governments who have got an obligation to safeguard the interest and welfare of the children and girls of this country have to evaluate various measures and implement them in the right direction."

38.9 I also rely upon Judgement of the Bombay High Court (Coram: M.B. Shah, C.J. (as he was then) and F.I. Rebello, J) in the case of THE PUBLIC AT LARGE VS. THE STATE OF MAHARASHTRA & ORS., the Division Bench of the Bombay High Court took note of an article appeared in the in the daily Indian Express on 13.1.1996. The report discloses a very shocking and alarming state of affairs regarding sex workers operating in the city of Mumbai. The report indicated that minor girls were illegally confined and were forced to be sex workers. In that respect the Bombay High Court has delivered judgement and in paragraph Nos. 30 and 31 the Hon'ble Bombay High Court has observed thus:

"para 30 – We note that mandatory testing of sex workers has not been recommended. However,

experience shows that amongst the women, who were medically tested, an alarmingly large number amongst them were infected with AIDS. If no steps are taken to warn patrons of brothels, it will create a catastrophic situation in our nation. From the figure quoted earlier it is seen that the number of sex contact with infected sex workers in a year is around 14,850,000 in the City of Mumbai itself. The State Government will, therefore be well advised to take appropriate steps to educate the public at large about the dangers to the health of such persons and their families. Though such brothels are illegal, yet in reality they exist. In fact the various places where they exist are also referred to in the report prepared by the National Commission for Women. It says that the worst hit areas are the port cities.... If brothels cannot be closed down, at least steps should be taken to educate and inform those who patronise the places of the dangers of AIDS."

"para 31 – For the time being, apart from eradicating prostitution, the main question should be how to control illegal confinement of

minors and major girls for the purpose of prostitution. The second question is how to control minor and major girls being lured to this trade; thirdly how to eliminate pimps and others, who mete out inhuman treatment to such unfortunate girls and lastly control the spread of AAIDS. If the society claims to be a civilised one, then uncivilised activities of the anti-social elements who are kidnapping minor and major girls and pushing them into this trade is required to be absolutely wiped out and those who are involved in these activities should be harshly punished, so that it may have a deterrent effects on others."

38.10 In para 32 of the judgement the Hon'ble Court has given directions thus:

(1) The various directions given by the interim orders, if not complied with, should be complied with and acted upon periodically.

(2) The Respondents-State Government to see that strict vigilance is maintained in the areas where sex workers normally operate and to

rescue the child sex workers. Further, adequate steps should be taken to see that those who indulge in trafficking of women should be suitably punished. For this purpose, appropriate directions should be issued to the investigating agencies to take immediate steps. Sometimes, it is noticed that a Police Officer who detects this type of activity does not take immediate action on the ground that such duty is assigned to some other Officer. In our view, this is not the proper approach because all Police Officers are bound to prevent or take immediate action in those cases where cognizable offences are committed. It is true that they may not investigate those cases but can certainly report them to the proper officer and during such time take preventive measures. Section 107 of the Indian Penal Code provides that “a person abets the doing of a thing who intentionally aids by act act or illegal omission, the doing of that thing”.

(3) It is high time that the State Government should take serious steps:

(a) to prevent forcible pushing of women and

young girls into prostitution;

(b) to prevent trafficking in women i.e. buying and selling of young girls.

These girls may be victims of kidnapping; they may be victims of various deprivations; they may be victims of circumstances beyond their control. For this purpose, regular raids, should be carried out in the area where sex workers operate. On numerous occasions it is reported in newspapers that persons from social organisations who dare to rescue these girls are manhandled, beaten or threatened. To prevent such situation, for the time being the Government must have a Squad of Police Officers who can take immediate action.

(4) The State Government to set up an Advisory Committee, if not already set up, within 4 weeks from today in terms of Direction, No. 2 of paragraph 15 of the Judgement of the Apex Court in the case of Vishal JeetJeet (supra) to comply with the objects set out therein and to further take steps to implement the

suggestions made by the Advisory Committee.

(5) To set up homes for rehabilitation of rescued sex workers including children so as to enable these rescued sex workers to acquire alternative skills in order to enable them to have alternative source of employment. It is also to be noted that when the girls were rescued, it was difficult for the State authorities to provide residential accommodation to them. The State was not having any infrastruture to meet such a situation. It is true that in Mumbai City premises are very costly, but in the periphery of the City the State Government can certainly provide facility, more so when it is throughout claimed that Maharashtra State is a much more industrialised, developed and civilised State. In such a State, 473 rescued girls were not properly accommodated and no steps could be taken to rehabilitate them for want of premises and they were required to be sent to their respective home States. This type of situation arises only because of lack of interest on the part of the concerned authorities in implementing the decision of the Supreme Court.

In the case of Vishal Jeet (supra). If the problem is looked at from the angle that these young girls are also daughters and sisters of someone and that they are also required to be treated as human beings, then the State authorities can easily find out a solution to the problem. During the course of hearing, we have noted that there are no adequate facilities available in the State of Maharashtra, particularly in Mumbai, where these rescued girls could be rehabilitated or kept for some period for bringing them out of the clutches of unscrupulous elements who deal in trafficking of women. Adequate training facilities are also not available and it appears that serious thought is not given to this to this problem by the State Government. In a civilised State, it is the duty of the State to take preventive measures to eradicate child prostitution without giving room for any complaint of culpable indifference. One should not forget that these rescued girls are also fellow human beings who require some support and treatment for getting out of the immoral activities.

(6) Regularly carry out AIDS awareness programme in the areas where sex workers normally operate.

(7) The State Government is also directed to submit periodical reports, by taking out Notices of Motion, either through the learned Advocate-General or the learned Government Pleader, stating what steps are taken pursuant to the aforesaid directions and how may girls are rescued from the clutches of middlemen; whether medical treatment is given and whether rehabilitation facilities are made available to them. Even recent newspaper reports indicate that pimps or middlemen are raising their muscle strength to prevent NGOs from rescuing illegally confined girls.

(8) The State Government is further directed to place before this Court the compliance report of these directions."

(Quoted from the Book "Women and the Law – II" by Christine Chorine, Mihir Desai, Colin Gonsalves Women rights published page 827).

38.11 I refer to the book of Criminology, 5th Edition, page 457 the learned author has dealt with prostitution,

and has observed on page No. 461 thus:

> “Prostitution – The Consequent Harms – Prostitution has been denunciated in almost all societies for various reasons; the most fundamental reason being that it offends the elementary norms of decency and culture and involves human debasement of the lowest order. It has been condemned as an evil, albeit inevitable, by social reformers, religious thinkers and philosophers alike, illegitimate sex is considered to be a great sin under all the religious systems and it should be too evident that the lowest level of illegitimate sexual conduct is reached in prostitution. `What can be called more sordid more void of modesty, more full of shame than prostitutes, brothels and every other evil of this kind? Yet remove prostitutes from human affairs, and you will pollute all things with lust; set them among honest matrons, and you will dishonour all things with disgrace and turpitude' , commented St. Augustine on prostitution. Thomas Acquinas expressed the same idea in the following words:

`Prostitution is like the filth in the sea, or a sewer in the palace. Take away the sewer, the you will fill the palace with pollution; and likewise with the filth (in the sea). Take away prostitutes from the world, and you will fill it with sodomy' “.

Further combating prostitution on page 463 the learned author has observed thus:

“In India the main legislation dealing with the problem is the Suppression of Immoral Traffic Act, 1956 (to be referred hereafter as SITA). The Act does not prohibit prostitution as such but seeks to remove some of the conditions which promote prostitution. The provisions are directed mainly towards those who either organize prostitution by running brothels or induct women into the sex trade.

The only situations for which a prostitute can be punished are:

1. Where prostitution is carried on in premises which are within a distance of 200

yards of any place of public religious worship, educational institution, hotel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the commissioner of police or district magistrate.

2. Where a prostitute makes positive attempts to seduce or solicit persons for purposes of prostitution.

38.12 One important object of the act is to rescue girls in need of help and provision has been made for protection homes.

38.13 The need for change in SITA was continuously felt but it was only in 1986 that some significant changes were introduced. A new name the Immoral Traffic (Prevention) Act was given to the amended legislation.

38.14 Under the New Act the definition of prostitution has been widened to mean `the sexual exploitation or abuse of persons for commercial purposes'. The word `person' has replaced the expressions `women' and `girls' making it possible to include males as well in the definition of prostitution, the male

customers of the prostitutes also being the victims of commercial exploitation. The Act classifies the persons into three categories viz., children, minors and adults; the former two being less than 18 and 16 years respectively. Under Section 5, procuring, inducing or taking for the sake of prostitution is made punishable with varying periods of imprisonment, greater punishment being prescribed for offences against minors and children."

38.15 Enforcement of laws – page 464:

> "The idea of rescue homes has not been properly implemented because of the acute shortage of such homes. For a vast country like India there are only 81 rescue homes in all, most of the homes are very well managed and ill-equipped, specially those under government management.
>
> There have been practical difficulties in the fulfillment of the formalities for the implementation of certain provisions of SITA. Section 15(2) of the Act empowers the special police officer, when he has reasonable grounds

to believe that an offence in respect of a girl is being committed and a search with warrant will cause undue delay, to search the premises without a warrant in the presence of two or more respectable persons of the locality of whom one at least is to be a woman, and remove the girl and produce her forthwith before the magistrate. The insistence on the presence of two respectable persons of the locality is based on sound public policy in order to prevent the harassment of innocent persons by the police. More often than not, it is however not possible to manage two respectable persons willing to associate themselves with the proceedings in connection with activities of a dubious nature."

38.15A Prostitution in Surat (A study of Women in the profession of Prostitution in Surat City, 1990) Report of the Research Project Financed by the M.S.U.B. Vide S.R. No. 34(3) (31) dated 30.12.89 by Leena Vihang Mehta – on page 56 some suggestion is given:

"It is suggested that until we as a state and

also as society, really determine and equip ourselves sufficiently to do away with this evil completely, we should be open enough to accept the realities and make compromise, with our "ideal but unachievable" goal of abolishing prostitution. In other words, just as we have consumer's protection Act. We also should be fair enough to give legal protection to prostitutes by regulating the minimum price structure and providing for regular medical checkups, living and work conditions in flesh trade. The interest of the children of prostitutes also should be protected.

As suggested in the earlier paragraphs, the community welfare centre can take up the task of educating the customer as well as the prostitutes to protect each area from V.D. & AIDS and of motivating them to use precautionary measures. Against such diseases.

Page 57 further suggestion is given:

"The prostitutes should be made aware about their legal position systematic legal guidance

should be made available to them so that the chances of unnecessary harassment can be minimised and they get at least a fair and just legal trial.

38.16 Future plans:

Very few respondents were ready to leave the profession and their expectations were found to be slightly unrealistic in view of our overall economy. Most of them desired to leave the profession only if they are offered good pay as well as housing accommodation.

38.17 Suggestion:

Almost all the respondents wished to have a secured job with regular income and a place to stay. In fact the law already provides for protective homes and vocational training for girls and women willing to come out of the flesh trade. In reality, very few beneficiaries of the state homes belong to this category. It seems that persistent motivation and outside support are needed to help these women together

courage, confidence and to shirk away the insecurity."

39. This habeas corpus petition raises important question of interpretation of Immoral Traffic (Prevention) Act, 1956. I have gone through the record of the case and the grounds supplied therein. I am satisfied that the authority has properly arrived at the subjective satisfaction to detain the person as he was indulging in the activity in connection with immoral traffic. The act in question is not only concerned with an individual but the society at large and I have considered Article 23 of the Constitution and the provisions of the Act as well as judgement of the Apex Court in VISHAL JEET (supra) and the judgement of the Bombay High Court in the case of THE PUBLIC AT LARGE VS. THE STATE OF MAHARASHTRA & ORS. (supra) and the directions issued by the Court and some of the passages of the book "Criminology" by S.M.A. Qadri, Fifth Edition. All these observations are important and therefore this Court is of the view that in the present case the detention order ought to have been upheld and the detenu should not be released from jail as he is committing crime not only against the individual but against the society at large particularly with women which also affects a large number of people with

dangerous disease like AIDS.

40 This matter raises an important question of interpretation of provisions of the Immoral Traffic Act and the Gender Justice which is very common today. Looking to the importance of the matter, this Court directs the Registrar General of this Court to send copies of the judgement to: (1) The Secretary, Home Department; (2) The Secretary, Public Health, Social, Welfare and Planning Department, (3) The Secretary, Education Department. This Court hopes and trusts that all these authorities will consider the observations made by this Court as well as various judgements which have been quoted, particularly, the judgement of the Hon'ble Supreme Court in the case of VISHAL JEET (supra) and the judgement of the Bombay High Court in the case of THE PUBLIC AT LARGE VS. STATE OF MAHARASHTRA (supra), particularly, the directions issued by the Division Bench (Coram: M.B. Shah, C.J (as he then was) and F.I. Rebello, J) which may also be applicable to the State of Gujarat.

41. It is no doubt true that prostitution is a very old profession which is carrying on since ages and though the Government and other agencies are trying to

make effort to eradicate the same, they have not been fully successful. If the steps which have been suggested in this judgement and any other step which may be necessary, and the State Government implements the same, at least, some progress can be done. If that is done, it will go a long way.

42. This Court further hopes and trusts that another method to eradicate prostitution or at least further preventing is to educate girls and women upto 12th standard or upto the age of 18 years and the Government may make the same free or reasonably so cheap so all girls can take education irrespective of their financial position. If the girls are educated and studied, further opportunity can be given by the State Government to earn their own livelihood. It is well known that no women or girls join the profession at their own sweet will or volition. They have to do it under severe compulsion as there is no other alternative to them. If education and employment opportunity is provided to them, girls will not automatically fall into the trap of this profession.

43. Another advantage is that if the females are educated they will understand family planning and that may also solve the problem of population which is also a

very important question which the Government faces. This Court hopes and trusts that all the above suggestions the Government will consider and try to implement the same.

44. Before parting with this judgement, this Court beholden to Ms. Banna Datta, learned advocate, who has appeared as amicus curiae at the request of this Court and has very ably assisted this Court in discussing and deciding this matter.

45. In view of the same, this petition is rejected. Rule is discharged with no order as to costs.

(K.M. Mehta, J.)

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